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Supreme Court, U.S.
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No. 10-

In the
Supreme Court of the United States

PAUL O. ROHART, M.D.,
Petitioner,

v.

E.H.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL, FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Introduction:

This petition arises from the application of Florida statutes concerning the reporting of information regarding a physician to the Florida Department of Health in a manner that violates the Contract Clause of the U.S. Constitution by impairing the contractual relationship between Petitioner and Respondent in their settlement agreement.

In Florida, physicians have no right or say in the formation and/or execution of a settlement agreement by a medical malpractice insurer, despite the fact that the agreement obligates the physician. Here, Petitioner's carrier entered into a settlement agreement with Respondent providing, *inter alia*, that Respondent would release, for $12,500.00, the Petitioner from "any and all claims, actions, demands, causes of action ... known and unknown arising on account of or in any way growing out of any and all known and unknown personal injuries ... resulting to or from an incident (accident) which occurred on or about 5/22/05 at North Broward Hospital District d/b/a Broward General Medical Center ...." At the time the settlement agreement was executed, the only "action" Respondent had in existence against any party to the settlement agreement was a Department of Health complaint against Petitioner regarding the emergency room treatment he provided her. Nevertheless, Respondent – despite the ability to do so – refused to

take any action to withdraw or otherwise terminate the Department of Health Complaint that she initiated against Petitioner.

The Florida Courts refuse to enforce Respondent's contractual obligations to Petitioner by applying statutes concerning the reporting of information regarding a physician to immunize her from suit for her breach of the settlement agreement. They have also deprived Petitioner of his due process right to appellate review by denying him a written opinion that he can appeal to the Florida Supreme Court. Accordingly, for the reasons stated below, this Petition should be granted.

Question 1:

Should this Court grant this Petition to address the Florida State Courts' impairment of "the obligation of contracts" by applying Fla. Stat. § 456.073(11) and (12) in violation of Art. I, Sec. 10 of the U. S. Constitution and Art. I, Sec. 10 of the Florida Constitution?

Question 2:

Should this Court grant this Petition to address the deprivation of Petitioner's due process rights and equal protection rights by the Florida Courts' application of Fla. Stat. § 456.073(11) and (12) in violation of Art. I, Sec. 10 of the U. S. Constitution and Art. I, Sec. 10 of the Florida Constitution?

Question 3:

Should this Court grant this Petition to address the deprivation of Petitioner's due process rights by the Florida Courts failure to issue a written opinion, thereby depriving Petitioner of the ability to seek review from the State's highest court?

PARTIES TO THE PROCEEDINGS

Petitioner

Paul O. Rohart, M.D is an emergency medicine physician.

Respondent

E.H. is a claimant who executed a settlement agreement, which named the Petitioner.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDINGS iv

TABLE OF CONTENTS.....v

TABLE OF AUTHORITIES.....vii

PETITION FOR A WRIT OF CERTIORARI.....1

OPINIONS BELOW 1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS INVOLVED....2

STATUTES INVOLVED.....3

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING PETITION.....6

I. THE FLORIDA COURTS VIOLATED THE CONTRACT CLAUSE BY APPLYING STATE STATUTES IN ORDER TO TOTALLY IMPAIR THE PETITIONER'S RIGHT TO ENFORCE AN ENFORCEABLE CONTRACT 6

II. THE FLORIDA COURTS ALSO VIOLATED THE FLORIDA CONSTITUTION BY APPLYING STATE STATUTES IN ORDER TO TOTALLY IMPAIR THE PETITIONER'S RIGHT TO ENFORCE AN ENFORCEABLE CONTRACT.....12

III. THE FLORIDA COURTS DEPRIVED THE PETITIONER OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW BECAUSE THEY FAILED TO APPLY THE LAW TO THE ADMITTED FACTS AND BECAUSE THEY DEPRIVED THE PETITIONER OF FURTHER APPLELLATE REVIEW BY REFUSING TO ISSUE A WRITTEN OPINION.....15

IV. THE FACTS AND LAW SUPPORT THE PETITIONER.....19

CONCLUSION 24

APPENDIX.....26

A. DISTRICT COURT ORDER (12/01/2010).....1a
affirmance

B. CIRCUIT COURT ORDER (08/10/2009).....3a
granting summary judgment

C. DISTRICT COURT ORDER (01/10/2011).....11a
denial of rehearing and request for opinion

TABLE OF AUTHORITIES

Cases:

Allied Structural Steel Co. v. Spannaus,
438 US 234 (1978).....7, 8, 11, 16

Black v. Romano,
471 U.S. 606 (1985).....18, 19

B. Vance v.
Indian Hammock Hunt & Riding Club, Ltd.,
403 So.2d 1367 (Fla. 4th DCA 1981).....23-24

Camp v. Parks,
314 So.2d 611 (Fla. 4th DCA 1975).....22

City of Lakeland v. Select Tenures, Inc.,
176 So. 274 (1937).....23

Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.,
174 So.2d 614 (Fla. 2nd DCA 1965).....22

Dodi Pub. Co. v. Editorial America,
385 So.2d 1369 (Fla. 1954).....6, 17

Duncan v. Louisiana,
391 U.S. 145 (1968).....15

Ellis v. State,
762 So.2d 912, 912 (Fla. 2000).....23

Energy Reserves Group, Inc. v. Kansas Power and Light Co.,
459 U.S. 400 (1983).....8, 9, 11

Ex parte McCarthy,
[1924] 1 K.B. 256 (1923).....18

Holmes v. Burchette,
766 So.2d 387 (Fla. 2nd DCA 2000).....20

JOJO's Clubhouse, Inc. v. DBR Asset Management, Inc.,
860 So.2d 503 (Fla. 4th DCA 2003).....16, 24

Kendal v. Pontious,
261 So.2d 167 (Fla. 1972).....20-21

Larsen v. Lesser,
106 So.2d 188 (Fla. 1958).....9

Louisiana ex rel. Ranger v, New Orleans,
102 U.S. 203 (1880).....12

Mathews v. Eldridge,
424 U.S. 319 (1976).....15, 19

Mathews v. Metropolitan Life Insurance Co.,
89 So.2d 641 (Fla. 1956).....17

Montgomery v. English,
902 So.2d 836 (Fla. 5th DCA 2005).....21

Office Pavilion S. Fla.. v. ASAL Prods., Inc.,
849 So.2d 367 (Fla. 4th DCA 2003).....21

Offutt v. United States,
348 U.S. 11 (1954).....18

Ogden v. Saunders,
25 U.S. 213 (1827).....7, 12

Pac. Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991).....15

Posner v. Posner,
257 So.2d 530 (Fla. 1972).....10

R. Pomponio v. Claridge of Pompano Condo., Inc.,
378 So.2d 774 (Fla. 1980).....12, 13

Quinerly v. Dundee Corp.,
31 So.2d 533 (1947).....10

Sarasota Beverage Co. v. Johnson,
551 So.2d 503 (Fla. 2nd DCA 1989).....22

Specht v. Patterson,
336 U.S. 605 (1967).....18

Spiegel v. Allen Holmes, Inc.,
834 So.2d 295 (Fla. 4th DCA 2002).....9, 17

Testa v. Katt,
(330 U.S. 386 1947).....7

United States Trust Co. v. New Jersey,
431 U.S. 1 (1977).....8, 11

Wolowitz v. Thoroughbred Motors, Inc.,
765 So.2d 920 (Fla. 2nd DCA 2000).....24

W.R. Townsend Contracting, Inc. v.
Jensen Cov. Constr., Inc.,
728 So.2d 297 (Fla. 1st DCA 1999).....20

Yamaha Parts Distribution v. Ehrman,
316 So.2d 557 (Fla. 1975).....12, 14

Statutes:

§456.073, Fla. Stat.....5

§456.073(1), Fla. Stat.....22

§456.073(11), Fla. Stat..... *passim*

§456.073(12), Fla. Stat..... *passim*

§627.4147(1)(b), Fla. Stat.....9

Rule:

Florida Rule of Appellate Procedure 9.330(a)....18

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the Fourth District Court of Appeal, West Palm Beach, Florida. The Petition addresses issues of significance: 1) the total impairment of the "*obligation of contracts*" by using state statutes to deny a physician's right to enforce a breach of an enforceable settlement agreement in violation of the Contract Clause of the U.S. Constitution, Art. I, Sec. 10 and the Contract Clause of the Florida Constitution, Art. I, Sec. 10; and 2) the deprivation of the Petitioner's right to due process and equal protection.

OPINIONS BELOW

Fourth District Court of Appeal affirmance: App A. Circuit Court decision granting summary judgment: App B. Fourth District Court of Appeal denial of rehearing: App C.

JURISDICTION

Florida's Fourth District Court of Appeal affirmed the Circuit Court's order on December 1, 2010 and denied Petitioner's motion for rehearing and request for an opinion on January 10, 2011. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Contract Clause of the U.S. Constitution reads: "No State shall pass any Law impairing the Obligation of Contracts." U.S. Const. Art. I, Sec. 10.

The Contract Clause of the Florida Constitution reads: "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." Fla. Const. Art. I, Sec. 10.

The Due Process Clause of the U.S. Constitution reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Equal Protection Clause of the U.S. Constitution reads: "... or deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The Supremacy Clause of the U.S. Constitution reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. Art. VI, ¶ 2.

STATUTES INVOLVED

Fla. Stat. § 465.073(11) states: "A privilege against civil liability is hereby granted to any complainant or any witness with regard to information furnished with respect to any investigation or proceeding pursuant to this section, unless the complainant or witness acted in bad faith or with malice in providing such information."

Fla. Stat. § 465.073(12): (a) "No person who reports in any capacity, whether or not required by law, information to the department with regard to the incompetence, impairment, or unprofessional conduct of any health care provider ... shall be held liable in any civil action for reporting against such health care provider if such person acts without intentional fraud or malice."

STATEMENT OF THE CASE

This case concerns the Respondent's breach of her settlement agreement, in which she agreed to release the Petitioner from all "actions" against the Petitioner. The Florida Courts have granted Respondent immunity for her breach of contract by applying Florida Statutes to completely impair Petitioner's ability to enforce the agreement.

On or about May 22, 2005, Respondent was involved in a car accident and had been presented for treatment in the Broward General Medical Center emergency room. She claimed that she sustained

injuries resulting from treatment Petitioner provided in the emergency room.

On May 30, 2007, the Respondent executed a settlement agreement. It specifically stated that Respondent would release, for $12,500.00, the Petitioner from "any and all claims, actions, demands, causes of action ... known and unknown arising on account of or in any way growing out of any and all known and unknown personal injuries ... resulting to or from an incident (accident) which occurred on or about 5/22/05 at North Broward Hospital District d/b/a Broward General Medical Center ...."

The agreement continued in ¶ 4 that: "I further warrant that I (we) have read the foregoing release and indemnity agreement, fully understand it and all of its provisions and obligations, and sign it willingly as my (our) own free act and deed with the intent to be strictly bound hereby."

At the time the settlement agreement was executed, the only "action" Respondent had in existence against any party to the settlement agreement was a Department of Health complaint against Petitioner regarding the emergency room treatment he provided her. Black's Law Dictionary defines "action" as: "a formal complaint within the jurisdiction of the law."

Respondent admits that she made the complaint, and that she did not withdraw or otherwise terminate the Department of Health complaint. Petitioner claims a breach of the settlement agreement because Respondent failed to terminate the Department of Health complaint. Respondent

contends that, notwithstanding the plain language of the settlement agreement, she was not obligated to withdraw her "action" against the Petitioner because she has immunity under Fla. Stat. § 456.073(11) and (12).

Petitioner asserts that the Respondent was not injured by Petitioner's treatment. Respondent claims that she was injured, but refuses to produce any evidence supporting her claim despite numerous discovery requests.

The case has four Defendants, Columbia Casualty Company, Melsar Risk Management Services, Inc., Alliance Risk Management Services, LLC and E.H. The Appellate decision, in the instant Petition, only includes Respondent, E.H. The case has seven counts, one of which is: 1) Breach of Contract.

On August 10, 2009, the Circuit Court granted Respondent's summary judgment motion and stated the following:

> "E.H. is entitled to immunity for any claims arising out of the complaint she filed with the Board of Medicine, pursuant to §456.073, Fla. Stat."

The Petitioner's breach of contract claim does not arise from the Respondent's reporting to the Department of Health. It arises from the Respondent's breach of her agreement by failing to withdraw all "actions," which would include the complaint to the Department of Health. The agreement does not refer to Fla. Stat. § 456.073.

Upon appeal to the Florida Fourth District Court of Appeal, the Petitioner presented that the Circuit Court 1) refused to apply contract law to admitted facts, and 2) applied § 456.073(11), Fla. Stat. and §456.073(12), Fla. Stat., when the Respondent had waived these statutes as affirmative defenses for immunity. The Fourth District Court, on December 1, 2010, affirmed the Circuit Court's grant of summary judgment without an opinion. On January 10, 2011, the Petitioner's motion for rehearing and a written opinion was denied. The Fourth District Court refused to inform the Petitioner of the reasons for its decision, and denied the Petitioner access to further Appellate review by doing so, because the Supreme Court of the State of Florida lacks jurisdiction to review a per curiam affirmance without an opinion. *See Dodi Pub. Co. v. Editorial America*, 385 So.2d 1369 (Fla. 1980).

REASONS FOR GRANTING PETITION

POINT I: THE FLORIDA COURTS VIOLATED THE CONTRACT CLAUSE BY APPLYING STATE STATUTES IN ORDER TO TOTALLY IMPAIR THE PETITIONER'S RIGHT TO ENFORCE AN ENFORCEABLE CONTRACT

FEDERAL

"This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby ...." U.S. Const. Art. VI, ¶ 2. The Contract Clause of the

U.S. Constitution reads: "No State shall pass any Law impairing the Obligation of Contracts." U.S. Const. Art. I, Sec. 10. The Florida Circuit Court and the Florida Fourth District Court of Appeal had the duty to enforce the U.S. Constitution and Federal Law, including the Contract Clause, but they failed to do so.

The leading case recognizing the duty of state courts to enforce federal law is *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L. Ed. 967 (1947). The *Testa* Court found that the "States of the Union constitute a nation" and the States cannot disregard "the purpose and effect of Article VI, § 2 of the Constitution..." *Testa* at 389.

Meanwhile, "[c]ontracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Allied Structural Steel Co. v. Spannaus*, 438 US 234, 245, 98 S. Ct. 2716, 57 L. Ed.2d 727, 737 (1978). "The prohibition of 'laws impairing the obligation of contracts, 'was intended to prevent the remaining mischiefs which experience had shown to flow from legislative interferences with contracts, and to establish a great conservative principle, under which they might be protected from unjust acts of legislation in any form." *Ogden v. Saunders*, 25 U.S. 213, 216 (1827). "The constitution always accompanies the law, and the latter can have no force which the former does not allow to it." *Ogden* at 243.

The U. S. Supreme Court has articulated a three-part test to determine the constitutionality of

impairment: (1) a threshold inquiry of whether the state law has operated as a substantial impairment of a contractual relationship; (2) if the state regulation constitutes a substantial impairment, whether the state has a significant and legitimate public purpose behind the regulation; and (3) whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption.". *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411-413, 103 S. Ct. 697, 704-706, 74 L. Ed.2d 569, 580-582(1983) (citations omitted). Applying these principles here, the Florida Courts' improperly impaired Petitioner's contractual rights by their blanket application of Fla. Stat. § 456.073(11) and (12) to this case. Indeed, the Florida courts application of those statutes totally destroyed the benefits conferred on Petitioner by the settlement agreement.

Regarding the first prong, the severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. *Allied Structural Steel Co.*, 438 U.S. at 234. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. *United States Trust Co.*, 431 U.S. at 26-27. This Court found, in part, a statute invalid under the Contract Clause of the Constitution, because "the statute in question here nullifies express terms of the company's contractual obligations ...." *Allied Structural Steel Co.*, 438 U.S. at 247.

The Circuit Court's application of Fla. Stat. § 456.073(11) and (12) to grant immunity for the Respondent's breach of the agreement has completely impaired Petitioner's right to enforce Respondent's contractual obligations under the settlement agreement. There can be nothing more substantial than to negate the enforcement of an enforceable contract.

This is compounded further, when one considers that an insurer, in Florida, does not even have to confer with a physician before executing a settlement agreement that obligates a physician, even if the insurance policy states otherwise. *See* § 627.4147(1)(b), Fla. Stat. The Florida Court's decision extends this impairment, with § 456.073, Fla. Stat., by eliminating the right of the Petitioner to enforce an insurance settlement agreement and to claim a breach of the agreement. Accordingly, the first part of the *Energy Reserves* test is met.

Regarding the second prong of the test, the purpose behind Fla. Stat. § 456.073(11) and (12) is not implicated by the enforcement of a settlement agreement. The State of Florida has determined that "settlement agreements are favored as a means to conserve judicial resources ... They are interpreted and governed by the law of contracts." *Spiegel v. Allen Holmes, Inc.*, 834 So.2d 295, 297 (Fla. 4th Dist. Ct. App. 2002).

The Florida Supreme Court has long recognized that "while there is no such thing as an absolute freedom of contract, freedom is the general rule and restraint is the exception." *Larsen v. Lesser*, 106 So.2d 188, 191 (Fla. 1958). "[I]t is a a

matter of great public concern that freedom of contract be not lightly interfered with." *Bitumanous Gas Corp. v. Williams*, 154 Fla. 191, 197, 17 So.2d 98, 101 (1944). This freedom empowers parties to join together in pursuit of mutually beneficial ends, but also "includes freedom to make a bad bargain." *Posner v. Posner*, 257 So.2d 530, 535 (Fla. 1972). Courts may not rewrite contracts, interfere with freedom of contracts, or substitute their judgment for that of the contracting parties. *Quinerly v. Dundee Corp.*, 159 Fla. 219, 222, 31 So.2d 533, 534 (1947).

The State of Florida does not have a significant or legitimate purpose to utilize these sections to eliminate a physician's right to enforce a settlement agreement. As noted above, the Florida Fourth District Court of Appeal has previously declared that settlement agreements are "favored as a means to conserve judicial resources" and are "governed by the law of contracts." *Id.*

The State's objective in Fla. Stat. § 456.073 (11) is to grant immunity to "any complainant or any witness *with regard to information furnished*" *to* the Department of Health. This is to facilitate reporting of information to the Department of Health. Its purpose is specific to the furnishing of information to the Department of Health, not the withdrawal of a complaint. Similarly, the State's objective in § 456.073 (12), Fla. Stat. is to grant immunity *for reporting "information to* the department [of health]...." Again, this does not implicate the withdrawal of a complaint.

Any "legislation adjusting the rights and responsibilities of contracting parties must be upon

reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co.*, 431 U.S. at 22; *Allied Structural Steel Corp.*, 438 U.S. at 244. The public purpose of facilitating the reporting of information to the Department of Health does not justify the impairment of the obligation of contracts.

The Florida Courts have not articulated any significant and legitimate public purpose to overrule the use of settlement agreements "as a means to conserve judicial resources" through these statutes. Accordingly, the second prong of the *Energy Reserves* test has been met.

Regarding the third prong of the test, the purpose of Fla. Stat. § 456.073(11) and (12) is directed toward the act of supplying and/or reporting information to the Department of Health. It is not directed to the impairment of an enforceable contract entered into and breached by the Respondent, for which no viable defenses to the breach exist. The Petitioner's breach of contract claim is directed to Respondent's breach of her agreement, not the Respondent's act of reporting.

"Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co.*, 431 U.S. at 22. Any reason for the impairment of contractual rights has no relationship to the reason for the adoption of the legislation. Accordingly, the third prong of the *Energy Reserves* test is met.

In sum, the Florida Courts use of the statutes to grant complete immunity for a breach of an enforceable agreement is an abandonment of the Law of Contracts and a clear violation of Art. I, Sec. 10 of the U. S. Constitution. "Wherever there is a right, there must be a remedy. The remedy may be modified, but it may not be so modified as to impair or destroy the obligation." *Ogden* at 220. Therefore, this Petition should be granted.

POINT II. THE FLORIDA COURTS ALSO VIOLATED THE FLORIDA CONSTITUTION BY APPLYING STATE STATUTES IN ORDER TO TOTALLY IMPAIR THE PETITIONER'S RIGHT TO ENFORCE AN ENFORCEABLE CONTRACT

The Contract Clause of the Florida Constitution reads: "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." Fla. Const. Art. I, Sec. 10. Here, for the same reasons stated above, the Petitioner's reasonable expectations have been totally impaired by the application of the statutes to the agreement.

The Florida Supreme Court's approach in analyzing the impairment of a contract issue begins with both *Yamaha Parts Distribution v. Ehrman*, 316 So.2d 557 (Fla. 1975)(virtually no degree of contract impairment is tolerable in this state) and *Lousiana ex rel. Ranger v, New Orleans*, 102 U.S. 203, 26 L.Ed 132 (1880)("he who pays too late, pays less"). *R. Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So.2d 774, 780 (Fla. 1980). "Whatever legislation lessens the efficacy of the means of enforcement of

the [contractual] obligation is an impairment." *Id.* at FN 41.

> Our conclusion in *Yamaha* that "virtually" no impairment is tolerable necessarily implies that some impairment is tolerable, although perhaps not so much as would be acceptable under the traditional federal contract clause analysis.
>
> To determine how much impairment is tolerable, we must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy. Obviously, this becomes a balancing process to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the states objective, or to whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective. *Id.* at 780.

As stated above, the Florida Courts' actions resulted in the total and permanent impairment of the obligation of contracts. The Circuit Court stated, in its order, that "E.H. is entitled to immunity for any claims arising out of the Complaint she filed

with the Board of Medicine, pursuant to § 456.073, Fla. Stat." The Circuit Court's order specifically applies Fla. Stat. § 456.073(11) and (12) to support this grant of immunity. The Circuit Court application of these statutes makes the agreement E.H. executed completely unenforceable. If the Court grants immunity for a breach of an agreement based upon these statutes, it is not just substantially impairing the enforcement of contractual rights, but is completely eliminating the contractual rights of the Petitioner. In *Yamaha Parts Distribution* the Florida Supreme court has stated that "that 'virtually' no impairment is tolerable," and this would imply that complete impairment of the "Obligation of Contracts" would be a clear violation of Art. I, Sec. 10 of the Florida Constitution and Art. I, Sec. 10 of the U.S. Constitution. And for this reason, the Petition should be granted.

In the instant case, the impairment cannot be described as "some impairment." The nature of the impairment is total destruction and is intolerable under the Florida Constitution. The statutes unreasonably intrude on the parties' Constitutional right to bargain and to enforce their reasonable expectations.

Allowing a party to an agreement to use these statutes to seek immunity for a breach of a settlement agreement is a perversion of the statutes, a significant impairment of contract law and a violation of Art. I, Sec. 10 of the Florida Constitution and the Art. I, Sec. 10 of the U.S. Constitution. Therefore, this Petition should be granted.

POINT III: THE FLORIDA COURTS DEPRIVED THE PETITIONER OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW BECAUSE THEY FAILED TO APPLY THE LAW TO THE ADMITTED FACTS AND BECAUSE THEY DEPRIVED THE PETITIONER OF FURTHER APPLELLATE REVIEW BY REFUSING TO ISSUE A WRITTEN OPINION.

This Court has held that "virtually all" of the individual rights found in the Bill of Rights apply to the States through the Due Process Clause of the Fourteenth Amendment. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 34, 111 S. Ct. 1032, 113 L. Ed.2d 1 (1991). Under the doctrine of selective incorporation, these rights have been applied to the States because they are considered "fundamental"—that is, "necessary to an Anglo-American regime of ordered liberty." *Duncan v. Louisiana,* 391 U.S. 145, 149 n.14, 88 S. Ct. 1444, 20 L. Ed.2d 491 (1968).

The Court, in *Mathews v. Eldridge*, 424 U.S. 319, 332-335, 96 S. Ct. 893, 47 L. Ed.2d 18 (1976), has stated that the resolution of the constitutional sufficiency of due process procedures requires the consideration of three factors: 1) the private interest that will be affected by the official action; 2) the risk of erroneous deprivation of such interest through the procedures used and probable value, if any, of additional procedural safeguards; and 3) the Government's interest, including the fiscal and administrative burdens that the additional or substitute procedures would entail. It has been held that individuals have the right to make contracts "to

order their personal and business affairs ... [and] Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Allied Structural Steel Co.*, 438 US 234, 245.

The Florida Fourth District Court of Appeal and Florida Circuit Court deprived the Petitioner of his right to contract and to enforce contractual obligations by applying Fla. Stat. § 456.073(11) and (12) in the manner they did. The risk of erroneous deprivation was certain.

The State of Florida can show no legitimate interest in applying these statutes as a means to completely impair the Petitioner's and Respondent's right to contract. There would be no additional burdens to the State of Florida if the Florida Courts would simply apply contract law and honor their duty to adhere to Art. I, Sec. 10 of the U.S. Constitution.

Additionally, Respondent failed to allege any facts, in her affirmative defenses which would bring the case within the purview of Fla. Stat. § 456.073(11) and (12). An affirmative defense not raised is waived, and should not be considered by the Court or used by the Court as a basis for granting summary judgment. *JOJO's Clubhouse, Inc. v. DBR Asset Management, Inc.*, 860 So.2d 503, 503 (Fla. 4th Dist. Ct. App. 2003).

The Florida Circuit Court and the Florida Fourth District Court of Appeal failed to apply

contract law to the admitted facts. This deprivation is striking when one considers that the Fourth District Court has held that "settlement agreements are favored as a means to conserve judicial resources ... They are interpreted and governed by the law of contracts. *Spiegel v. Allen Holmes, Inc.*, 834 So.2d 295, 297 (Fla. 4th Dist. Ct. App. 2002).

The Florida Court's denied the Petitioner due process and equal protection under the law.

> It seems to be settled law of this state that the duty of a court to apply to admitted facts a correct principle of law is such a fundamental and essential element of the judicial process that a litigant cannot be said to have a remedy by due course of law ... if the judge fails or refuses to perform that duty. *State v. Smith*, 118 So.2d 792, 795 (Fla. 1st DCA 1960); *Mathews v. Metropolitan Life Insurance Co.*, 89 So.2d 641, 642 (Fla. 1956).

Adding insult to injury, the Fourth District Court's affirmance without an opinion insured that the Petitioner would not have the ability to seek review by the Florida Supreme Court. *See Dodi Pub. Co., supra.* Eliminating the Petitioner's ability to seek review, from the Florida Supreme Court, when contract law was not applied to admitted facts compounds the due process and equal protection

deprivation by eliminating his best means of recourse for their erroneous actions.

In the instant case, a decision without an opinion offends the principle that justice must be rendered in public and subjects the litigants to secret justice. *Ex parte McCarthy*, [1924] 1 K.B. 256, 259 (1923) ("Justice should not only be done, but should be manifestly and undoubtedly be seen to be done."). *Offutt v. United States*, 348 U.S. 11, 14, 99 L. Ed 11, 75 S. Ct. 11 (1954) ("Justice must satisfy the appearance of justice."). The appearance of justice is undermined when an opinion is not given, and when a request for an opinion is denied. Particularly, as Florida's Rules of Appellate Procedure, at Rule 9.330(a), allow a party to request a written opinion when the party believes it would provide a legitimate basis for Supreme Court review. An essential element of due process is that the litigant be informed of the reason for a decision. This is particularly relevant when a decision is made against the litigant.

Since a reviewing Court would be unable to determine if the decision-maker's findings were supported by the evidence, a written statement facilitates appellate review. *Black v. Romano*, 471 U.S. 606, 606, 105 S. Ct. 2254, 85 L. Ed.2d 636 (1985); *Specht v. Patterson*, 386 U.S. 605, 610, 87 S. Ct. 1209, 1212, 18 L. Ed.2d 326, 330 (1967). "When written reasons would contribute significantly to the 'fairness and reliability' of the process by which an individual is deprived of liberty or property ... reasons must be given ... unless the balance between the individual interest affected and the burden to the

government tilts against the individual." *Black v. Romano* at 618 quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). "The touchstone of due process is the protection of the individual against the arbitrary action of the government." *Black v. Romano* at 624.

Here, by refusing to provide a written opinion, the Florida Courts have deprived Petitioner of due process and prevented him from addressing the issues in a proper fashion. For these reasons, this Petition should be granted.

POINT IV: THE FACTS AND LAW SUPPORT THE PETITIONER

Physicians in Florida have an expectation that any settlement agreement will be strictly honored because of the enormous impact any settlement agreement has on their careers and life. The legislature and courts of the State of Florida have taken away the right of Florida physicians to have any say in the formation and/or execution of a settlement agreement. They should not take away the Petitioner's right to enforce a settlement agreement and to claim a breach of the agreement.

The elements of an action for breach of contract are: 1) existence of a contract, 2) compliance with the conditions of the contract, 3) material breach of the contract, and 4) injury legally caused by the breach.

Respondent executed an agreement on May 30, 2007, that for the sum of $12,500.00, she was to "release, acquit, remise and forever discharge

Petitioner from "any and all claims, actions, demands, causes of action, damages, cost, loss of services, expenses, compensation and all consequential damages, known and unknown arising on account of or in any way growing out of any and all known and unknown personal injuries (and property damage) resulting to or from an incident (accident) which occurred on or about 5/22/05 at North Broward Hospital District d/b/a Broward General Medical Center, Ft. Lauderdale, FL." Exhibit 3. The agreement continued, in ¶ 4, with: "I further warrant that I (we) have read the foregoing release and indemnity agreement, fully understand it and all of its provisions and obligations, and sign it willingly as my (our) own free act and deed with the intent to be strictly bound hereby."

For an enforceable contract to exist, there must be an offer, acceptance, consideration, and sufficient specification of the terms so that the obligations involved may be ascertained. *W.R. Townsend Contracting, Inc. v. Jensen Cov. Constr., Inc.*, 728 So.2d 297, 300 (Fla. 1st DCA 1999). In the instant case, these criteria are satisfied, and the agreement is enforceable.

The parties must be capable of contracting. *Holmes v. Burchette*, 766 So.2d 387 (Fla. 2nd Dist. Ct. App. 2000). The Respondent was of majority and capable of contracting at the time and date of execution. The acceptance of an offer must be: 1) absolute and unconditional, 2) identical to the terms of the offer, and 3) in the mode, at the place, and within the time expressly or impliedly required by the offer. *Kendal v. Pontious*, 261 So.2d 167 (Fla.

1972); see also *Montgomery v. English*, 902 So.2d 836 (Fla. 5th Dist. Ct. App. 2005). The Respondent's acceptance was absolute and unconditional, identical to the terms of the agreement, and within the time frame that the offeror set. The offeror did not invalidate the agreement.

Consideration is an essential element of a contract. *Office Pavilion S. Fla.. v. ASAL Prods., Inc.* 849 So.2d 367 (Fla. 4th Dist. Ct. App. 2003). Here, a check for $12,500.00 was issued by Alliance Risk Management Services, LLC to Respondent.

The only "action" that Respondent had in existence against the Petitioner and other and entities named in the settlement agreement, was a complaint against the Petitioner with the Florida Department of Health claiming "personal injuries ... resulting to or from an incident ... which occurred on or about 5/22/05 at North Broward Hospital District d/b/a Broward General Medical Center, Ft. Lauderdale, FL." The Respondent did not file a medical malpractice complaint against the Petitioner. Nor did she engage in any pre-suit investigation, as required by Florida law.

The Respondent did not withdraw or otherwise terminate the complaint she filed against the Petitioner with the Florida Department of Health. The Respondent had agreed that she "fully understand[s] it [the agreement] and all of its provisions and obligations, and to **sign it willingly** as my (our) own free act and deed **with the intent to be strictly bound hereby**." When a contract is clear and unambiguous, the Court cannot give it any meaning other than that expressed in it, and cannot rewrite

the contract. *Sarasota Beverage Co. v. Johnson*, 551 So.2d 503 (Fla. 2nd DCA 1989). Here, the only reasonable interpretation of the settlement agreement is that Respondent agreed to withdraw or otherwise terminate the complaint against Petitioner. There is no real dispute that Petitioner was damaged as a result of the Complaint to the Florida Department of Health not being withdrawn by the Respondent. (Affidavit of Petitioner).

Nor does Respondent have any defense to her breach. Impossibility of performance and frustration of purpose do not apply. "Impossibility of performance refers to those factual situations, too numerous to catalog, for which the contract was made, have, on one side become impossible to perform. Frustration of purpose refers to that condition surrounding the contracting parties where one of the parties finds that the purpose for which he bargained, and which purposes were known to the other party, have been frustrated because of the failure of consideration, or impossibility of performance by the other party." *Camp v. Parks*, 314 So.2d 611, 615 (Fla. 4th DCA 1975) (citing *Crown Ice Machine Leasing Co. v. Sam Senter Farms, Inc.*, 174 So.2d 614, 617 (Fla. 2nd DCA 1965).

Respondent had the right to withdraw her complaint, but she did not. Fla. Stat. § 456.073(1) gave Respondent the right to withdraw her complaint by stating: "...the original complainant withdraws it [the complaint to the Department of Health] or otherwise indicates a desire not to cause the complaint to be investigated or prosecuted to completion ...." It was possible and her ability to

withdraw was not frustrated in any way. Respondent just did not do it.

The Respondent cannot argue ignorance of the law. "[T]he public is on constructive notice of statutory requirements." *Ellis V. State*, 762 So.2d 912, 912 (Fla. 2000)(recognizing that publication in the Laws of Florida or the Florida Statutes gives all citizens constructive notice of the consequences of their actions). Respondent attempted to claim immunity under § 456.073(11), Fla. Stat. and § 456.073(12), Fla. Stat., but these statutory sections do not apply to a breach of contract claim that is directed to the demise and/or release of a cause of action initiated by the Respondent against the Petitioner.

Also, Respondent had waived any defense under Fla. Stat. § 456.073(11) and (12) by not alleging sufficient facts to bring the case within those sections. The only references in the pleading to Fla. Stat. § 456.073(11) and (12) are affirmative defenses No. 24 and No. 25. No 25 states: "The Defendants cannot withdraw or conclude administrative investigations handled by the Department of Health of the State of Florida pursuant to §§ 456.073 and 458.331, Florida Statutes." No. 24 states: "The Defendants are entitled to attorney fees' and costs pursuant to §456.073(12), Florida Statutes."

Respondent alleges no facts in her affirmative defenses supporting a claim for immunity which would bring it within the purview of Fla. Stat. § 456.073(11) or (12). *City of Lakeland v. Select Tenures, Inc.*, 129 Fla. 338, 176 So. 274, 277 (1937); *B. Vance v. Indian Hammock Hunt & Riding Club,*

Ltd., 403 So.2d 1367, 1369 (Fla. 4th DCA 1981). An affirmative defense not raised is waived, and should not be considered by the Court or used by the Court as a basis for granting summary judgment. *Wolowitz v. Thoroughbred Motors, Inc.*, 765 So.2d 920, 923 (Fla. 2nd DCA 2000); *JOJO's Clubhouse, Inc. v. DBR Asset Management, Inc.*, 860 So.2d 503, 503 (Fla. 4th DCA 2003).

Petitioner had shown the Florida District Court of Appeal that Florida law, as applied to the facts, supports that there was an enforceable contract, that the Respondent breached it, and that the Respondent had no immunity or defenses for her breach. The Florida Courts nevertheless denied Petitioner relief. Therefore, this Petition should be granted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

William T. Cushing, M.D.
Counsel of Record
307 Bridgegate Drive
Cary, NC 27519
919-454-8288

APPENDIX A — PER CURIAM DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT DATED DECEMBER 1, 2010

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT
July Term 2010

No. 4D09-3397

[December 1, 2010]

PAUL O. ROHART, M.D.,
Appellant

v.

MELSAR RISK MANAGEMENT SERVICES, INC., ALLIANCE RISK MANAGEMENT SERVICES, LLC, COLUMBIA CASUALTY COMPANY AND E.H.,
Appellees

PER CURIAM.

Affirmed.

Warner, Polen and Farmer, JJ., concur.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; John T. Luzzo, Judge; L.T. Case No. 08-26446 CACE 18.

William T. Cushing, Cary, North Carolina, for Appellant.

Debra Potter Klauber of Haliczer, Pettis & Schwamm, Fort Lauderdale, for Appellee E.H.

APPENDIX B —ORDER OF THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA DATED August 10, 2009

IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

JUDGE: JOHN T. LUZZO.

Case No. CACE 08 - 26446 (18)

PAUL O. ROHART, M.D.,

Plaintiff,

vs.

MELSAR RISK MANAGEMENT SERVICES, INC., ALLIANCE RISK MANAGEMENT SERVICES, LLC, COLUMBIA CASUALTY COMPANY and E.H.,

Defendants.

ORDER GRANTING MOTION FOR FINAL SUMMARY JUDGMENT IN FAVOR OF E.H.

This matter having come before the Court on Monday, July 27, 2009, on the Defendant, E.H.'s, Motion for Summary Judgment, and the court having

reviewed the motions and memoranda of law and documents attached thereto, and having heard arguments of counsel, and being otherwise fully advised in the premises, hereby enters its Findings of Fact and Conclusions of Law as follows:

A. Findings of Fact

The Court finds that the following facts are undisputed.[1] The Plaintiff, PAUL ROHART, M.D., an emergency medicine room physician, treated the Defendant/Patient, E.H., in the emergency room at Broward General Medical Center on May 22, 2205, following a car accident. E.H. later complained that DR.ROHART failed to diagnose a fibula fracture, and further failed to communicate to her that she had fractured her back. She complained to the hospital and to the Department of Health, Board of Medicine, which undertook its own investigation. The Defendant, COLUMBIA CASUALTY COMPANY, was DR. ROHART'S medical malpractice carrier, which had issued a policy with $1,000,000 in coverage for professional negligence claims.

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[1] DR. ROHART has objected to the Defendants use of its claims file documents as evidence In support of the Motion for Summary Judgment. However, this Court had based its findings on the documents submitted to the Court by DR. ROHART and, therefore, his Motion to Strike the use of these exhibits is denied as moot.

In or about March of 2007, E.H. and, MELSAR RISK MANAGEMENT SERVICES, INC. agreed to resolve the claim for $12,500,[2] and the settlement release was signed on March 30, 2007.[3] After the settlement was effectuated, it was reported to the State of Florida, Department of Health, and the National Practitioner's Data Bank, through the United States Department of

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[2] DR. ROHART'S challenge that the settlement was effectuated after the statute of limitations had expired is misplaced. The record clearly reflects that there was a meeting of the minds by the parties as to the amount and terms of the settlement by, at least, May 14, 2007, more than a week before the statute of limitations expired, employing the construing of the statute of limitations in the manner seemingly most favorable to Dr. Rohart.

[3] Again, DR. ROHART's argument about the language utilized in the release does not affect the Defendants' entitlement to immunity here, while he claims that the release did not include language required by §766.113, the Court finds that the settlement agreement and the reports include similar language noting that the settlement did not, necessarily, imply negligence on the part of the health care providers released therein. Furthermore the statute itself does not provide that the failure to utilize that exact language will result in voiding the release and, absent such language, this Court will not do so. See, e.g. RTG Furniture Corp. v. Ind. Risk Ins., 2008 WL 4541022 (S.D. Fla. 2008); Chalfonte Condominium Apt. Ass'n., Inc. v. QBE Ins. Corp., 526 D. Supp 2s 1251 (S.D. Fla. 2007).

Health and Human Services. E.H. did not participate in the reporting of this information.

DR. ROHART took issue with the settlement and filed this action. In his Complaint, DR,ROHART alleges that E.H. breached the settlement agreement/release by refusing to withdraw her complaint with the Department of Health/Board of Medicine, and further claims that she conspired with the other Defendants in this case, to report the malpractice settlement to the appropriate state and federal agencies, in an attempt to damage him.

B. Conclusions of Law

1. Breach of Contract

E.H. was a patient of DR. ROHART'S who maintained that he negligently cared for her. She put him and his carrier on notice of her complaints and, ultimately, agreed to accept $12,500 in order to resolve the case. On May 30, 2007, she signed a release that states, in pertinent part:

> FOR AND INCONSIDERATION of the payment to me ... of $12,500.00 ... I ... the undersigned ... here RELEASE, ACQUIT, REMISE and FOREVER DISCHARGE, Paul O. Rohart, M.D., Phoenix Emergency Medicine of Broward, LLC, North Broward Hospital District d/b/a Broward General Medical Center

... from any and all claims, actions, demands, causes of action ... arising on account of or in any way growing out of any and all know[n] and unknow[n] personal injuries ... resulting to or from an incident (accident) which occurred on or about 5/22/05 at North Broward Hospital District d/b/a Broward General Medical Center, Ft. Lauderdale, FL.

DR. ROHART claims that this release required E.H. to affirmatively withdraw her complaint to the Department of Health/Board of Medicine and that, accordingly, she breached the agreement in failing or refusing to do so. E.H. has filed an affidavit with the Court that is dispositive of this issue. She affirmatively states that she never agreed to withdraw her complaint.

It is also important to note that Dr. Rohart cannot establish hat he was damaged by E.H.'s alleged failure to withdraw the administrative complaint, even assuming that had been anticipated at the time of the settlement. Once the Board of Medicine received E.H.'s complaint, it was obligated, by Florida law, to investigate. See §456.073, Fla. Stat. In fact, the Board of Medicine had already filed an administrative complaint against DR. ROHART months before E.H. resolved the potential civil claim against him. The Department of Health or Board of Medicine was authorized, by statute, to investigate and

take appropriate final action the complaint "even though the original complainant withdraws it or otherwise indicates a desire not to cause the complaint to be investigated or prosecuted to completion." See §456.073(1), Fla. Stat. Thus, E.H.'S action, or inaction, with regard to that administrative complaint cannot have had any effect on the outcome of the administrative proceedings.

Further, that statute itself provided E.H. with immunity stating, "[a] privilege against civil liability is hereby granted to any complainant or any witness with regard to information furnished with respect to any investigation or proceeding pursuant to this section, unless the complainant or witness acted in bad faith or with malice in providing such information." See §456.073(11), Fla. Stat. See also §456.073(12)("no person who reports in any capacity, whether or not required by law, information to the department with regard to the incompetence, impairment, or unprofessional conduct of any health care provider licensed under chapter 458 ... shall be held liable in any civil action for reporting against such health care provider if such person acts without intentional fraud or malice").

Accordingly, the Court finds that E.H. did not breach the settlement agreement and further, her actions following the execution of the settlement agreement cannot be deemed to have caused any damage to DR. ROHART. Finally, E.H. is entitled to immunity for any claims arising out of the complaint she filed with the Board of Medicine, pursuant to §456.073.

2. Conspiracy

DR. ROHART'S second claim against E.H asserts that she conspired with the other Defendants to report this medical malpractice lawsuit to the appropriate state and federal entities. It is undisputed on this record that E.H. was not aware of, and did not participate in, the reporting of the medical malpractice settlement by the insurance carrier or its designee. Additionally, this Court has ruled, in separate Order, that the other Defendants are entitled to summary judgment, and immunity, as a matter of law, with regard to the actions they took in this case. Accordingly, since their actions were not unlawful, DR. ROHART cannot establish that there was any conspiracy in this case. See, e.g., Rami v. Furlong, 702 So. 2d 1273 (Fla. 3d DCA 1998)(holding that a civil conspiracy claim requires an agreement between tow or more parties to do an unlawful act or to do a lawful act by unlawful means,

the doing of some overt act in pursuance of the conspiracy, and damages)(also noting that an actionable conspiracy requires an actionable underlying tort or wrong). Accordingly, this Court finds that, as a matter of law, DR. ROHART cannot state a claim for civil conspiracy against E.H.

IT IS HEREBY ORDERED AND ADJUDGED that the Defendant, E.H.'s, Motion for Summary Judgment is GRANTED. The Court reserves jurisdiction to address attorneys' fees and costs.

DONE AND ORDER on this 10 day of August, 2009, at Chambers at Fort Lauderdale, Broward County, Florida.

_____

Honorable John T. Luzzo
Circuit Court Judge
CIRCUIT COURT JUDGE

Copies: James S. Haliczer, Esq.
William Cushing, M.D., J.D

APPENDIX C — ORDER OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT DATED January 10, 2011

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

CASE NO.: 4D09-3397
L.T. No.: 08-26446 CACE 18

January 10, 2011

PAUL O. ROHART, M.D.
Appellant / Petitioner(s),

v.

E.H., MELSAR RISK MANAGEMENT, ETC., ET AL.
Appellees / Respondent(s).

BY ORDER OF THE COURT:

ORDERED that Petitioner's motion filed DECEMBER 10, 2010, for rehearing and request for an opinion and reconsideration of order granting attorney's fees are hereby denied.

Served:
William Cushing, M.D.
James Haliczer
Debra Potter Klauber

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.
/s/_____
MARILYN BEUTTENMULLER, Clerk Fourth District Court of Appeal